No. 14864

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK DAVID WINGER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Rules

Statutes

Textbook

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Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California, adjudging the appellant to be guilty of two counts of an indictment charging him with conspiracy to commit offenses against the United States in violation of Section 371 of Title 18, United States Code [T. 1-3],[1] and with counselling, inducing, and procuring another to counterfeit obligations and securities of the United States in violation of Section 471 of Title 18, United States Code [T. 3-4].

The violations are alleged to have occurred in Los Angeles County, California, and within the Central Division of the Southern District of California [T. 2-3].

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[1]Reference to the Clerk's Transcript of Record are by the letter T and the page number; references to the Reporter's Transcript of Proceedings are by the letter R followed by the page number.

The jurisdiction of the District Court was based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Sections 1291 and 1294 of Title 28, United States Code.

Statement of the Case.

The appellant was convicted in the United States District Court for the Southern District of California, on each of two counts of an indictment filed in said District Court on May 4, 1955 [T. 6]. Trial by jury was waived and trial was by the court [T. 9].

The indictment was in five counts, but appellant was named only in Count One and Count Two. Count One charged the appellant and three others with conspiring to commit offenses against the United States in violation of Section 371 of Title 18, United States Code; and Count Two charged appellant with counseling, inducing, and procuring another to counterfeit obligations and securities of the United States, in violation of Section 471 of Title 18, United States Code [T. 1-4].

More particularly, Count One charged that Leo Duncan Hallak, Fred H. Shire, Thomas E. Opitz and appellant agreed, confederated, and conspired together, with intent to defraud, to falsely make, forge and counterfeit obligations and securities of the United States, namely: counterfeit $10.00, $20.00 and $50.00 federal reserve notes, more particularly described in the indictment. Four overt acts were alleged. Appellant was named in only one of them (overt act No. 1); it was never proved. According to the indictment, defendant Fred H. Shire was to make the counterfeit notes and he, together with the other

defendants, was to sell and distribute them in Los Angeles County, California, and elsewhere.

Count Two charged that on or about July 1, 1954, defendant Fred H. Shire, with intent to defraud, made a quantity of counterfeit $10.00, $20.00 and $50.00 federal reserve notes and that appellant counselled, induced and procured Shire to commit that offense.

At the conclusion of the Appellee's case [T. 16; R. 261 ff.], appellant moved the Court, pursuant to Rule 29, Federal Rules of Criminal Procedure, for a Judgment of Acquittal. The motion was denied [T. 17; R. 267].

The Court found appellant guilty of Counts One and Two [T. 23, 28; R. 540]. On July 11, 1955, the Court sentenced appellant to imprisonment for five years for the offense charged in Count One of the Indictment and to imprisonment for seven years for the offense charged in Count Two of the Indictment, said periods to commence and run concurrently [T. 28-29].

Notice of Appeal was filed on July 19, 1955 [T. 31-32]. The appellant has been confined continuously since his conviction [T. 23], and is now confined.

Statement of Facts.

The Facts of the Case in General.

At about 9:00 p.m. on Monday evening, February 7, 1955, at Patmar's Drive-In, El Segundo, California, Secret Service Agent Victor D. Carli was introduced to co-defendants Fred H. Shire and Thomas E. Opitz by informers Thomas Madray and Harry (Jack) Hall. Madray introduced Carli, saying, "This is Vic. He is the man that has the money to buy the counterfeit notes" [R. 31-32]. Discussion followed between Carli, Shire,

and Opitz as to the details of a proposed sale [R. 32] and finally Carli agreed to buy $140,000.00 worth of notes for $12,000.00.

The group then obtained a room in the Del Mar Hotel and Opitz and Shire left to obtain the counterfeit money. In about 45 minutes, Shire and Opitz returned with a carton which they said contained $150,000.00 in counterfeit $50.00, $20.00 and $10.00 notes [R. 33-35]. Carli then left the group, saying that he was going to call the man who was going to bring the money. Carli soon returned, and after a few minutes Secret Service Agent Gopadze arrived and Carli introduced him to Shire and Opitz, who were identified as the sellers. Just then a group of police officers arrived and placed all of those present, namely: Shire, Opitz, Carli, Gopadze, Madray and Hall, under arrest [R. 35, 49].

At about 2:00 A. M., on February 8, 1955, a few hours after the arrest, Shire told Secret Service Agents Carli and Gopadze that he, Shire, had made the negatives and plates, had purchased the paper and the ink, and had printed the counterfeit money himself. He said that, after printing the money, he had cut up the plates and negatives and had flushed them down the sewer [R. 41-44, 50]. Shire later told the agents that he had printed about $200,000.00 in counterfeit notes, had destroyed about $50,000.00, given about $4,000.00 to co-defendant Hallak, and had sold the remainder to Carli on the night of the arrest [R. 45].

On February 8, 1955, Shire also told a deputy sheriff that he had printed counterfeit currency [R. 58]; and he showed agents Carli and Gopadze where he had printed and stored the counterfeit notes and destroyed the negatives and plates [R. 51].

The counterfeit notes sold to Agent Carli by defendants Shire and Opitz on February 7, 1955, were found to be the same as some counterfeit notes which had been recovered from defendant Leo Duncan Hallak in September, 1954 [R. 29-31]. On the evening of September 9, 1954, defendant Hallak, who had been drinking [R. 15], struck up a casual conversation with a motorcycle operator, Francis Wayne Crow [R. 12-13]. After a time Hallak and Crow went to Hallak's house, where Hallak showed Crow some paper money in denominations of $10.00, $20.00 and $50.00 [R. 17], which Crow claimed was "phoney." This angered Hallak, who drew a revolver and demanded that Crow tell him why the money looked "phoney." He also had Crow put one of the bills in the oven, where it burned. Crow was held in Hallak's house for a couple of hours, after which he and Hallak started to leave the house. Crow then took advantage of an opportunity to get away from Hallak and, when he reached a telephone, he called the police [R. 14-15]. After the police arrived at Hallak's house, they and Hallak found a burned piece of a bill. Crow next saw Hallak on the following evening, September 10, 1954, in the Firestone Substation of the Sheriff's Office [R. 21].

After his arrest, Hallak was interviewed by Secret Service Agent Carli, and on September 14, 1954, at Hallak's house, Hallak withdrew two $20.00 notes and two $10.00 notes from a rock beneath the house and surrendered them to Agent Carli [R. 30].

On September 26, 1954, Ralph Brees, of Long Beach, California, found about $3,971.00 worth of paper money near his house, and turned it over to the police [R. 22-26, 90-92], who in turn gave it to Secret Service Agents

[R. 28, 92]. Agent Carli recognized this money as similar to the notes he had received from Hallak [R. 29]; and on September 27, 1954, Hallak admitted to Carli that the notes found by Mr. Brees were some which he, Hallak, had secreted [R. 38]. He said that he obtained them from "Blackie" [R. 39]. Sometime in February, 1955, after the arrest of Shire and Opitz, Hallak, who was still under arrest, told Carli that he had bought his counterfeit notes from Fred Shire [R. 38].

At the trial Madray, the informer, testified for the Government that he knew all of the defendants [R. 94-96] and that in about late May, 1954, he told defendant Opitz that he knew where some paper was to be had and Opitz told him to "go ahead" [R. 109]. Madray also testified that in late May, 1954, defendant Opitz introduced him to defendant Shire [R. 110] and that Opitz told Madray that Shire could explain to Madray about the paper. Opitz then told Madray that Shire needed $250.00 for his family and Madray told Opitz that he wouldn't give it to Shire but he would give it to Opitz because he had known him longer [R. 111]. The next day, according to Madray's testimony, Opitz came to the Trade Winds Cafe and met Madray and Madray gave him the $250.00. Nothing was said. Madray then ". . . went out in front to the phone booth" [R. 112].

Madray also testified that a few days later Opitz met him and gave him a creased $100.00 bill and asked Madray to obtain a new one because that one wouldn't photograph, since the crease showed up in the proof [R. 113]. Madray further testified that about three weeks later (which would be about June 25, 1954), de-

fendant Hallak gave him an envelope with a $50.00 bill in it and told him that he could have them in lots of $10,000.00 or more [R. 114-115].

Madray then testified that he left the vicinity at about that time [R. 115] and had no further contact with the defendants until January, 1955, when he telephoned to Opitz [R. 118] and the latter said that he had $150,000.00 in counterfeit money [R. 119-120] and asked if Madray could do anything with it. Madray said that he would shop around and see [R. 120]. According to Madray's testimony, about a month later Madray met defendant Shire in Pershing Square, Los Angeles [R. 120], and Shire said that they wanted $15,000.00 for the money [R. 121]; Madray replied that he could get them $12,-000.00. The next evening Madray telephoned Opitz several times [R. 122] and told him that he had a buyer with cash and a meeting with Opitz was arranged [R. 125]. Madray and the buyer couldn't keep their appointment with Opitz, so Madray called Opitz again and arranged a meeting for Monday night at Patmar's in El Segundo and a motel. On Monday night, Secret Service Agent Carli picked up Madray at 8:00 P. M., and they went to Patmar's [R. 126], where they waited for about 15 minutes before Opitz and Shire drove up. Carli, Shire and Opitz discussed the price [R. 127]. A motel room was then rented and the group waited there until a man came with the money [R. 128]. Shortly afterwards the police arrived and Shire, Opitz, Madray, Harry Hall, Carli and Gopadze were arrested [R. 129].

Another Government witness, Kay Yoshida, an order filler for Kelley Paper Company, testified that he knew both defendant Fred Shire and Mrs. Shire [R. 191, 193, 206-207, 220], who had done business with Kelley Paper

Company for about two years [R. 218-220, 366] and had made many purchases [R. 207, 218-220, 366]. Mr. Yoshida testified that on August 23 and August 26 (apparently 1954), Shire & Shire had purchased 1,000 sheets of 100% rag paper from Kelley [R. 192]. The sheets were 22 inches wide by 34 inches long. The paper purchased by Shire & Shire calipered the same as the counterfeit notes recovered in September, 1954, and in February, 1955 [R. 203-205]. The fact meant only that the paper was 20-lb. paper and had no other significance [R. 213].

The Only Evidence as to Appellant Winger Was as Follows.

At the trial Madray, the informer, testified that in early May, 1954, in the office of the Trade Winds, Madray, Opitz and Winger had a conversation in which Winger suggested ". . . that I (meaning Madray) go to Sonora, Mexica, if we could get some counterfeit money and buy gold with it" [R. 97, 101]. Madray testified he told them he would do so and they discussed the amount and Madray told them that he could purchase any amount, a million dollars worth [R. 101]. Madray also testified that "Winger said at the time that if we could get such money it would be a good idea to do so" [R. 102].

Madray further testified that late in May, 1954, at the Trade Winds, Winger and Madray [R. 104] spoke of paper to print the money on and Madray said that he might be able to make a contact for it [R. 106, 108]. At the end of May or first of June, 1954 [R. 111], according to Madray, Winger was present when Madray gave Opitz $250.00; nothing was said, and Madray immediately ". . . went out in front" [R. 112].

At the trial appellant Winger stipulated ". . . that at one time Mr. Hallak and Mr. Winger did live briefly together" [R. 70]. Deputy Anderson also testified that on September 22, 1954, Winger mentioned that he had lived ". . . out there." No address was given [R. 75].

On September 23, 1954, Winger went to a substation of the Sheriff's Office and obtained and gave receipts for [R. 160] some dishes in containers bearing a Minneapolis address [R. 169], which had been picked up at Hallak's home in early September [R. 161]. Winger told the Deputy that a couple of wool blankets and a couple of fishing reels were missing. The Deputy obtained them and release them to Winger, who receipted for them [R. 165-166]. Winger told the Deputy that he had stayed with Hallak on occasion [R. 165] and that the dishes were wedding gifts which had been sent to him and his wife [R. 169]. Some female clothing which belonged to his wife was also returned to him [R. 169].

The appellant took the witness stand and testified in his own behalf [R. 312]; he denied his guilt of the offenses charged [R. 323, ff.].

Winger also testified that ". . . Mr. Hallak lived in Compton and I lived with him about approximately three weeks while my wife was back East" [R. 325]; this was about August 10th to August 29th [R. 326, 356-357].

The appellant further testified that he first met defendant Shire in the summer of 1954 [R. 332], but for about six months before that time [R. 334] Shire had been printing some advertising leaflets [R. 333] for him in connection with the operation of appellant's business, a restaurant and bar known as "Trade Winds" [R. 324-325].

Specifications of Error.

I.

The District Court erred in denying appellant's motion for a judgment of acquittal at the close of the evidence offered by the Government, for the reason that there was insufficient evidence to sustain the conviction of appellant on either of the counts charged against him in the indictment [T. 16-17; R. 261-267].

II.

The District Court erred in not acquitting appellant on each of the two counts in which he was charged in the indictment, for the reason that the evidence was insufficient to sustain a judgment of conviction on either of such counts.

ARGUMENT.

Specification of Error I.

The District Court Erred in Denying Appellant's Motion for a Judgment of Acquittal at the Close of the Evidence Offered by the Government, for the Reason That There Was Insufficient Evidence to Sustain the Conviction of Appellant on Either of the Counts Charged Against Him in the Indictment. [T. 16-17; R. 261-267.]

Those portions of Rule 29(a) of the Federal Rules of Criminal Procedure which are pertinent to this discussion provide:

> ". . . The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment . . . after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. . . ."

This rule has been interpreted to mean that:

> ". . . a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. . . . In a given case, particularly one of circumstantial evidence, that determination may depend upon the

difference between pure speculation and legitimate inference from proven facts."

Curley v. United States (C. A. D. C., 1947), 160 F. 2d 229, 232, cert. den. 331 U. S. 837.

See also:

Remmer v. United States (9 Cir., 1953), 205 F. 2d 277, 287-288.

In making the distinction between "pure speculation," on the one hand, and "legitimate inference from proven facts," on the other (*Curley v. United States, supra*) one must always keep foremost in mind the well settled principle that an inference cannot be predicated upon another inference, a presumption cannot be superimposed upon another presumption, in order to reach a factual conclusion.

Sapir v. United States (10 Cir., 1954), 216 F. 2d 722;

Direct Sales Co. v. United States (1943), 319 U. S. 703, 711;

Simon v. United States (6 Cir., 1935), 78 F. 2d 454, 456.

As to Count One.

Count One of the indictment charges the appellant and three others with agreeing, confederating, and conspiring together with intent to defraud, to falsely make, forge and counterfeit obligations and securities of the United States, in violation of the conspiracy statute, Section 371, Title 18, United States Code.

The pertinent part of that statute reads:

"If two or more persons conspire . . . to commit any offense against the United States, . . .

and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

A. The Gist of the Offense of Conspiracy Is the Agreement.

It has long been settled that:

". . . a conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means . . . It is a partnership in criminal purposes. The gist of the crime is the confederation or combination of minds.

"A conspiracy is constituted by agreement, it is, however, the result of the agreement and not the agreement itself. No formal agreement between the parties is essential to the formation of the conspiracy, for the agreement may be shown 'if there be concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose.' *Fowler v. U. S.* (C. C. A. 9), 273 F. 15, 19.

* * * * * * * *

". . . *an accused must join in the agreement to be guilty of a violation of the statute, for even if he commits an overt act, he does not violate the statute unless he joined in the agreement.*" (Emphasis added.)

Marino v. United States (9 Cir., 1937), 91 F. 2d 691, 693-695.

The above-quoted opinion of this court was cited by the Supreme Court in *United States v. Falcone, et al.*

(1940), 311 U. S. 205, 210, 85 L. Ed. 128, 61 S. Ct. 204, where that court said:

> "The gist of the offense of conspiracy . . . is agreement among the conspirators to commit an offense attended by an act of one or more of the conspirators to effect the object of the conspiracy. *Pettibone v. U. S.,* 148 U. S. 197; *Marino v. U. S., supra; Troutman v. U. S.,* 100 F. 2d 628; *Beland v. U. S.,* 100 F. 2d 289; *cf. Gebardi v. U. S., supra.* Those having no knowledge of the conspiracy are not conspirators, *U. S. v. Hirsch,* 100 U. S. 33, 34; *Weniger v. U. S.,* 47 F. 2d 692, 693; and one who without more furnishes supplies to an illicit distiller is not guilty of conspiracy even though his sale may have furthered the object of the conspiracy to which the distiller was a party but of which the supplier had no knowledge."

B. In Order to Constitute One a Party to a Conspiracy It Must Be Shown That He Has Intentionally Participated in the Transaction With a View to the Furtherance of the Common Design and Purpose.

We have seen (*United States v. Falcone; Marino v. United States, supra*) that the gist of the offense of conspiracy is the agreement and that those having no knowledge of the conspiracy are not conspirators. It is self-evident that if the gist of the offense is the agreement then mere knowledge, acquiescence, or approval of the act, without co-operation or agreement to cooperate, is not enough to constitute one a party to a conspiracy. In order to show that a person is a party to the conspiracy it is necessary to establish that there is "*concert of action,* all the parties *working together understand-*

ingly, with a single design for the accomplishment of a common purpose." (Emphasis added.)

Marino v. United States (9 Cir., 1937), 91 F. 2d 691, 694.

The United States Court of Appeals for the Tenth Circuit has recently held that:

"It is obvious that mere association with conspirators in matters not connected with the unlawful undertaking does not make one a conspirator, even though he may know that an unlawful undertaking is in the making by those with whom he associates . . . It is only when he associates with the conspirator *for the purpose of committing a public offense* that he becomes a member of the conspiracy."

Butler v. United States (10 Cir., 1952), 197 F. 2d 561, 564-565.

See also:

Van Huss v. United States (10 Cir., 1952), 197 F. 2d 120;

15 C. J. S. 1062.

The distinction between mere knowledge and acquiescence in the fact that a conspiracy exists and that combination of knowledge, intent, and cooperation which is essential to constitute one a member of a conspiracy was described by the Supreme Court in *Direct Sales Co. v. United States* (1943), 319 U. S. 703. In that case the petitioner was a drug manufacturer doing a mail order business in Buffalo, New York. Among its customers was a Dr. Tate in Calhoun Falls, South Carolina, a town of 2,000 people. Dr. Tate dispensed illegally vast quantities of morphine purchased from petitioner. Petitioner was indicted along with Dr. Tate on a charge of con-

spiracy and was convicted and appealed. The opinion of the Supreme Court stated, at page 705, that the salient facts were that Direct Sales sold morphine to Dr. Tate in such quantities, so frequently, and over so long a period of time, that it must have known that Dr. Tate could not dispense the amounts received in lawful practice and that Dr. Tate was therefore distributing the drug illegally. Not only was this true, but Direct Sales *actively stimulated* Dr. Tate's purchases.

The evidence showed that the average physician in the United States does not require more than 400 one-fourth grain tablets of morphine annually for legitimate use. Dr. Tate was buying an average of 5,000 to 6,000 one-half grain tablets per month from petitioner. Petitioner gave discounts of 50% on quantity sales of narcotics and listed them for sale in units of 500, 1,000, or 5,000 tablets.

The petitioner relied upon the *Falcone* case, on the theory that he could not be a party to the conspiracy merely because he supplied goods to an illicit merchant.

The Court distinguished the *Falcone* case, at page 711, saying:

> "This difference is important for two purposes. One is for making certain that the seller knows the buyer's intended illegal use. The other is to show that by the sale he intends to further, promote, and cooperate in it. This intent, when given effect by overt act, is the gist of the conspiracy. While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist. *U. S. v. Falcone,* . . . Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. *Ibid.* This,

because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes."

After discussing the petitioner's sales promotion in the form of discounts, etc., in the bulk sales of morphine, the Supreme Court went on to say, at page 713:

> "When the evidence discloses such a system, working in prolonged cooperation with a physician's unlawful purpose to supply him with his stock in trade for his illicit enterprise, there is no legal obstacle to finding that the supplier not only knows and acquiesces, but joins both mind and hand with him to make its accomplishment possible. *The step from knowledge to intent and agreement may be taken.* There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. And there is informed and interested cooperation, stimulation, instigation. There is also a 'stake in the venture' which, even if it may not be essential, is not irrelevant to the question of conspiracy. *U. S. v. Falcone,* 109 F. 2d 579, 581; and compare *Backun v. U. S.,* 112 F. 2d 635, 637; *U. S. v. Harrison,* 121 F. 2d 930, 933; *U. S. v. Pecoraro,* 115 F. 2d 245, 246." (Emphasis added.)

See also:

> *Samuel v. United States* (9 Cir., 1948), 169 F. 2d 787.

In the case at bar we find that the state of the evidence as to appellant at the time of making the Motion for Judgment of Acquittal was as follows:

> 1. According to the testimony of Madray, the informer, in early May, 1954, the appellant suggested

that he (Madray) go to Sonora, Mexico, "if we could get some counterfeit money and buy gold with it" R. 97, 101]. Madray said he would do so and could purchase any amount, a million dollars worth [R. 101]. Madray also testified that "Winger said at the time that if we could get such money it would be a good idea to do so" [R. 102].

2. According to the testimony of Madray, in late May, 1954, Winger and Madray spoke of paper to print the money on and Madray said that he might be able to make a contact for it [R. 106, 108].

3. At the end of May or first of June, 1954, according to Madray, Winger was present when Madray gave Opitz $250.00; nothing was said and Madray immediately went "out in front" [R. 111-112].

4. Winger and defendant Hallak had lived briefly together [R. 70, 75].

5. In late September, 1954, Winger went to a substation of the Sheriff's Office and obtained and receipted for [R. 160] some personal effects which had been found at Hallak's house [R. 161] and which consisted of some containers of dishes with a Minneapolis address which were wedding gifts to appellant and his wife [R. 169], some female clothing [R. 169], and a couple of blankets and fishing reels [R. 165-166].

The first of these items of evidence certainly is not the substantial evidence necessary to constitute one a member of a conspiracy. The plain words of the statements attributed to Winger necessarily imply that, at most, this was mere speculation and talk. The only possible inference is that, if ever there was a conspiracy, no conspiracy then

existed; the language negatives the possibility of a present conspiracy. In this connection it is significant that in the indictment the grand jury charged that the conspiracy began on or about July 1, 1954 [T. 1].

The second item is in the same category as the first. Furthermore, it is of doubtful credibility, since the indictment charges that Fred M. Shire was a party to the conspiracy and the Government's evidence showed that he was in the printing business and that he had been buying paper from the Kelley Paper Company for about two years [R. 218-220, 366] and had made many purchases [R. 207, 218-220, 366]. Clearly, he would not have needed the assistance of Madray to locate paper.

The third item proves absolutely nothing as to a connection between Winger and a conspiracy. Madray's own testimony was that he was giving the money to Opitz for the use of Shire, who needed the money for his family [R. 110-111].

The fourth and fifth items prove only that Winger lived briefly with Hallak and that he had left some odds and ends of his personal effects in Hallak's house. It is submitted that these items of evidence are not sufficient, even when taken together, to show that (1) an agreement, a confederation or combination of minds which is the gist of the crime of conspiracy, existed at all, or (2) if it did exist, that appellant Winger had "joined in the agreement."

Marino v. United States (9 Cir., 1937), 91 F. 2d 691, 694-695;

United States v. Falcone (1940), 311 U. S. 205, 210;

Direct Sales Co. v. United States (1943), 319 U. S. 703, 713.

The rule to be followed in passing on a motion for judgment of acquittal, as we have seen, is that the court must determine whether there is evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, and if there is not, the motion must be granted. "In a given case, particularly one of circumstantial evidence, that determination may depend upon the difference between pure speculation and legitimate inference from proven facts."

Curley v. United States (C. A. D. C., 1947), 160 F. 2d 229, 232.

In order to deny the motion of judgment of acquittal as to Count One of this indictment, it would be necessary to start with the above facts and then to infer:

1. That an agreement, or confederation and combination of the minds, to commit an offense, existed at the time of the facts in question.

(For such an agreement is the gist of the offense of conspiracy.

Marino v. United States, 91 F. 2d 691, 694;

United States v. Falcone, 311 U. S. 205, 210.)

2. That appellant Winger had knowledge of the fact of that agreement or conspiracy.

(Those having no knowledge of the conspiracy are not conspirators.

Direct Sales Co. v. United States, 319 U. S. 703;

United States v. Falcone, 311 U. S. 205, 210.)

3. That having such knowledge appellant Winger joined in the agreement or conspiracy.

(A person does not violate the conspiracy statute unless he joins in the agreement.

Direct Sales Co. v. United States, 319 U. S. 703;

Marino v. United States, 91 F. 2d 691, 695.)

It is submitted that here we have, *at most,* suspicion, carelessness, indifference and lack of concern. The state of the evidence does not meet the true requirements of membership in a conspiracy as set forth by the Supreme Court in *Direct Sales Co. v. United States,* 319 U. S. 703, where the court said that to take the step from knowledge to intent and agreement one must have more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. We do not here find, as was found in the *Direct Sales Co.* case, the "informed and interested cooperation, stimulation, instigation."

As was said in the *Direct Sales Co.* case (319 U. S. 703, 711):

> "Without the knowledge, the intent cannot exist . . . Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal . . . This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case (*United States v. Falcone*) was called a dragnet to draw in all substantive crimes."

See also:

Krulewitch v. United States (1940), 336 U. S. 440, 93 L. Ed. 790, 795.

The case at bar compares with *Simon v. United States* (6 Cir., 1935), 78 F. 2d 454, 456, where a conviction of defendant Viola of conspiracy to violate the counterfeiting laws was reversed.

There the defendant Viola was seen in an automobile with the other defendants shortly before the sale of counterfeit notes was consummated. The court held:

> ". . . There is nothing, however, to indicate that Viola knew the purpose of the expedition, or in any way contributed to it. He was not present when the sale was made, nor during the prior negotiations. To infer that he was a party to the conspiracy, or abetted the commission of the substantive offenses which were its object, is to establish a fact by building one inference upon another. This does not constitute substantial evidence to submit to a jury."

As to Count Two.

Count Two charged that on or about July 1, 1954, defendant Fred Shire, with intent to defraud, did falsely make, forge, and counterfeit obligations and securities of the United States, and that appellant Jack David Winger did counsel, induce, and procure the commission of said offense.

The evidence before the court as to this offense at the time of the motion for judgment of acquittal was identical with that described in the argument relative to Count One, above. It is submitted that the evidence as to this offense was not only insufficient to permit the court to deny the motion but that *there was no evidence at all.*

At the time of the ruling on the motion there was no evidence, of any type whatsoever, that appellant Winger had ever seen, known, known of, or communicated with defendant Shire at any time, about anything, or at all.

There are no facts to give rise to a question of fact or law and for that reason it is not possible to present a detailed argument. It is to be noted, however, that the proof of a conspiracy does not necessarily prove the commission of a substantive offense, and that the proof of a substantive offense does not necessarily prove a conspiracy.

Samuel v. United States (9 Cir., 1948), 169 F. 2d 787, 794;

United States v. Lutwak (7 Cir., 1952), 195 F. 2d 748, 753;

Peterson v. United States (9 Cir., 1921), 274 Fed. 929, 930.

Specification of Error II.

The District Court Erred in Not Acquitting the Defendant on Each of the Two Counts in Which He Was Charged in the Indictment, for the Reason that the Evidence Was Insufficient to Sustain a Judgment of Conviction on Either of Such Counts.

At the conclusion of all of the evidence, the only evidence before the court, in addition to that which was considered in the argument as to Specification of Error No. I, was the following:

1. Appellant Winger testified in his own behalf and denied his guilt as to the offenses charged [R. 312, 323 ff.].

2. Defendant Opitz denied that he had ever been present when Winger or Madray discussed counterfeit money or going to Mexico to buy gold with counterfeit money [R. 279], or that he had ever conversed with Winger about counterfeit money [R. 281].

3. Defendant Shire denied that he had ever conversed with appellant Winger concerning the making or selling or passing or anything concerning counterfeit money [R. 432].

4. Appellant Winger testified that ". . . Mr. Hallak lived in Compton and I lived with him about approximately three weeks while my wife was back East" [R. 325]; this was about August 10th to 29th [R. 326, 356-357].

5. Winger testified that he first met defendant Shire in the summer of 1954 [R. 332] but for about six months before that time [R. 334] Shire had

been printing some advertising leaflets [R. 333] for him in connection with the operation of appellant's business, a restaurant and bar known as the Trade Winds [R. 324-325].

6. Shire testified that he had been a printer and lithographer for between eleven and twelve years [R. 434]. He denied that the counterfeit notes were made by him on his own machine or any other machine [R. 434-435].

It is submitted that the evidence before the Court at the close of the case did not strengthen the case against appellant on either count. On the contrary, the evidence introduced during the defense further demonstrated the insufficiency of the evidence to support a judgment of conviction on either count as to appellant.

Conclusion.

The case against this appellant was based entirely upon circumstantial evidence. Appellant was shown to have been acquainted with an informer and with one member of a conspiracy to violate the counterfeiting laws, namely, Opitz. The strongest evidence, if believed, would show that he had joined in a conversation in which it was speculated that *if* the parties had counterfeit money, it *would* be a good idea to buy gold with it in Mexico. Some of appellant's personal effects were found in the home of one of the defendants, who, the evidence showed, had possession of some counterfeit money approximately ten days after appellant had left. Appellant had stayed with such defendant temporarily, while appellant's wife was on vacation.

In order to connect the appellant with the conspiracy, it would be necessary to infer from the above that (1) a conspiracy then existed; and (2) appellant knew of that conspiracy; and (3) knowing of the conspiracy, he joined into the agreement. The Government failed to prove these things. Also, there is absolutely no evidence whatsoever of his participation in the substantive offense charged in Count 2.

The appellant respectfully submits that the judgment of the District Court should be reversed.

Respectfully submitted,

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